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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6030

HENRY WILLIS,

Petitioner,

vs.

CHARLES R. BALKCOM, Warden,
Georgia State Prison,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF TATTNALL COUNTY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-

HENRY WILLIS, III,

Petitioner,

vs.

CHARLES R. BALKCOM, Warden,
Georgia State Prison,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF TATTNALL COUNTY

Petitioner prays that a writ of certiorari be issued to review the judgment of the Superior Court of Tattnall County, Georgia entered on August 29, 1980. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia November 13, 1980.

CITATIONS TO OPINION BELOW

Application for certificate of probable cause to appeal was denied by the Georgia Supreme Court November 13, 1980. The order of the Georgia Supreme Court and the unreported opinion of the Superior Court of Tattnall County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Tattnall County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied November 13, 1980. Pursuant to Rule 20 of the Rules of the Supreme Court the time for this petition runs from the denial of review issued by the Georgia Supreme Court November 13, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C hereto:

Georgia Code Ann. §26-1101
Georgia Code Ann. §38-801(d)
Georgia Code Ann. §50-127
Georgia Code Ann. §24-4526
Georgia Code Ann. §27-2534.1(b)[(1)-(7)]

QUESTIONS PRESENTED

-1-

Whether Georgia Code Ann. §27-2534.1(b)(7), upon which Petitioner's death sentence was in part based, was applied in Petitioner's case in a vague, overbroad, arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Whether Georgia Code Ann. §38-801(d), requiring the tender of attendance and mileage fees with a witness subpoena, denied Petitioner, an indigent death row inmate in a state habeas corpus proceeding, equal protection of the law, meaningful access to the courts and compulsory process to compel the attendance of witnesses in his behalf as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

HOW THE ISSUES WERE RAISED BELOW

-1-

By amendment to his state habeas corpus petition, Petitioner raised the issue of the unconstitutional application of Ga. Code Ann. §27-2534.1(b)(7) in his case. The habeas corpus court considered the merits of this issue and found against Petitioner. The constitutional issues were raised again on application for certificate of probable cause to appeal in the Georgia Supreme Court which denied the application.

-2-

Prior to the hearing on Petitioner's state petition for writ of habeas corpus, Petitioner moved the habeas corpus court to declare Georgia Code Ann. §38-801(d) unconstitutional as applied to Petitioner. The court denied the motion [Appendix G], specifically finding the statute to be constitutional. The constitutional issues were raised again on application for certificate of probable cause to appeal in the Georgia Supreme Court which denied the application.

STATEMENT OF THE CASE

On January 28, 1979, Petitioner was convicted of murder and sentenced to death in the Superior Court of Bleckley County, Georgia. The judgment and sentence was affirmed by the Georgia Supreme Court in Willis v. State, 243 Ga. 185; 253 S.E. 2d 70 (1979).

Certiorari was denied by this Court in Willis v. Georgia, 444 U.S. 885 (1979), rehearing denied, 444 U.S. 975 (1979).

On January 16, 1980 a petition for writ of habeas corpus was filed in the Superior Court of Tattnall County, Georgia; the petition was subsequently amended.

Prior to the habeas corpus hearing, Petitioner moved the court to declare unconstitutional Georgia Code Ann. §38-801(d) insofar as it required Petitioner, an indigent death row inmate, to tender witness and mileage fees with any subpoena for the habeas corpus hearing. The habeas corpus court, without allowing the requested hearing on the motion, held that the statute was constitutional.

The court denied habeas corpus relief on August 29, 1980 in an unreported decision. On November 13, 1980, the Georgia Supreme Court denied a timely application for certificate of probable cause to appeal.

REASONS FOR GRANTING THE WRIT

1. GEORGIA CODE ANN. §27-2534.1(b)(7), UPON WHICH PETITIONER'S DEATH SENTENCE WAS IN PART BASED, WAS APPLIED IN PETITIONER'S CASE IN A VAGUE, OVERBROAD, ARBITRARY AND CAPRICIOUS MANNER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's sentence of death was imposed by the trial court based in part upon a finding by the jury of the aggravating circumstance defined in Georgia Code Ann. §27-2534.1(b)(7).

By amendment to his state petition for writ of habeas corpus, Petitioner challenged the constitutionality of his sentence of death based in part on the §27-2534.1(b)(7) aggravating circumstance.

This Court has long recognized that the imposition of the death penalty may not be done in a capricious or arbitrary manner, arising out of passion or prejudice; for to do so is violative of the Eighth and Fourteenth Amendments. Furman v. Georgia, 409 U.S. 241 (1972).

This Court in Godfrey v. Georgia, ____U.S.____, 100 S. Ct. 1759 (1980), set forth two criteria that must be met if the Georgia Courts wish to impose a death sentence based upon a finding of the aggravating circumstance under Georgia Code Ann. §27-2534.1(b)(7).

The first criteria involves the trial court's instructions to the jury. Since the language of §(b)(7) fails to imply "...any inherent restraint on the arbitrary and capricious infliction of the death sentence", the trial court is required to impose a narrowing construction upon §(b)(7) in its jury charge. The trial court has a constitutional responsibility to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" to the jury. Godfrey v. Georgia, supra, at 1764-1765.

As this Court previously has recognized in reviewing Georgia's death penalty statute, it would be "virtually unthinkable" for a jury to decide whether a person should live or die without "careful instructions on the law and how to apply it" Gregg v. Georgia, 428 U.S. 153, 193 (1976).

In instructing the jury, the trial court should insure that the evidence that the offense was "outrageously and wantonly vile, horrible or inhuman" demonstrate "torture, depravity of mind, or an aggravated battery to the victim." Godfrey v. Georgia, supra at 1766.

Secondly, for a jury to find "depravity of mind", it must find that the defendant had the type of mental state that led him to torture or to commit an aggravated battery prior to the death of the victim, Id at 1766.

Finally, the word "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death, Id at 1766.

As in Godfrey, none of these standards were used in the present case to delimit §(b)(7) to the jury. Rather, the trial court simply read the text of the statute in its jury charge (T Trial, Vol. IV at pp. 1058-1059)(The complete charge to the jury is attached hereto as Appendix F). Repeating the language of §(b)(7) is clearly inadequate to protect against capricious and arbitrary decisions. The statute offers a jury no guidance concerning its intended meaning, Godfrey v. Georgia, supra, at 1765, and when no further guidance is given to the jury, its interpretation of §(b)(7) "...can only be the subject of sheer speculation", Id at 1765.

Quite obviously, the type of reasoned and channeled discretion envisioned in Furman v. Georgia, supra, cannot be obtained through the jury instructions used in both Godfrey and this case.

The second criteria addressed in Godfrey involves the role of the Georgia Supreme Court in its sentencing review. Like the trial court, the State Supreme Court is also required to delimit §(b)(7) by applying the three definitional standards, Godfrey v. Georgia, supra, at 1767. Under the Godfrey rationale, the death sentence in this case should be vacated. The Georgia Supreme Court failed to delimit §(b)(7) in the manner required by Godfrey.

On direct review of Petitioner's death sentence, the sole review by the Georgia Supreme Court of the application of the §(b)(7) is as follows:

> We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor and that the sentence is not excessive or disproportionate to the penalty

> imposed in similar cases considering both the crime and the defendant. Code Ann. §27-2537. In reviewing the sentence we have considered the cases appealed to this court since January 1, 1970, in which a death or a life sentence was imposed and we find the following similar cases listed in the appendix support affirmance of the death penalty. The evidence supports the aggravating circumstances. The verdict is factually substantiated.
> Willis v. State, 243 Ga. 185, 192; 253 S.E. 2d 70, 75-76 (1979).

The trial jury was given no guidance on the standards by which the §(b)(7) circumstance is applied and the Georgia Supreme Court gave not the slightest hint of the standards used in its review. The actual review was less than superficial; it was non-existent.

The Georgia habeas corpus court disposed of this issue by stating, "...Godfrey is not germane to or controlling of Petitioner's case", because, "Petitioner's death sentence was based not only upon (b)(7)...but also upon Georgia Code Ann. §§27-2534.1(b)(8)...and(b)(10)", [emphasis supplied], (Appendix B at p. 4).

Even though a jury finds that more than one aggravating circumstance exists, it is nevertheless free to impose a life sentence. While the finding of one or more aggravating circumstances permits a sentence of death, the finding of such circumstances never requires that it be imposed, Bowen v. State, 241 Ga. 492, 246 S.E. 2d 322 (1978).

The verdict of the jury to impose the death penalty in Georgia must be unanimous; if even one juror refuses to impose the death penalty, the defendant is sentenced to life imprisonment. Miller v. State, 237 Ga. 557, 229 S.E. 2d 376 (1976).

Under this scheme, each aggravating circumstance plays an important role in influencing the jury's decision. However, the weight given each circumstance by each juror is unclear and can only be speculated.

If the jury is improperly allowed to base its decision partially upon a finding of a §(b)(7) circumstance, it is impossible to determine to what extent the jury's decision to impose the death penalty rested upon the §(b)(7) circumstance.

This situation, which exists in the present case, invokes the rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound judgment requires its reversal. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). Where the jury is permitted to convict upon alternative legal theories, one of which is constitutionally permissible and the other of which is not, the jury's general verdict cannot stand. Stromberg v. California, 183 U.S. 359 (1931); Williams v. North Carolina, 317 U.S. 287 (1942); Terminello v. Chicago, 337 U.S. 1 (1949).

> "These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in a guilt-determining phase of any criminal trial." Pressnell v. Georgia, 439 U.S. 14, 19 (1978).

In fact, they should apply with added force, because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case", Woodson v. North Carolina, 428 U.S. 280, 305 (1979).

Because it cannot be said with assurance that the improper finding of a §(b)(7) circumstance played no part in the jury's decision to impose the death penalty, Petitioner's death sentence should be vacated.

2. GEORGIA CODE ANN. §38-801(d), REQUIRING THE TENDER OF ATTENDANCE AND MILEAGE FEES WITH A WITNESS SUBPOENA, DENIED PETITIONER, AN INDIGENT DEATH ROW INMATE IN A STATE HABEAS CORPUS PROCEEDING, EQUAL PROTECTION OF THE MEANINGFUL ACCESS TO THE COURT AND COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES IN HIS BEHALF AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner, an indigent death row inmate, sought habeas corpus review in State court of his conviction and death sentence. Prior to the hearing, Petitioner's counsel filed motions challenging the constitutionality of Georgia Code Ann. §38-801(d) and requesting funds for investigators and expert witnesses. [Appendix D and E , respectively]. These motions were denied by the habeas corpus court without a hearing. [Appendix G and Appendix H, respectively].

Due process may not require the Georgia legislature to institute the post-conviction procedure in Georgia Code Ann. §50-127. However, once provided, this procedure must be administered to provide a full and fair hearing and comport with the principles of Fourteenth Amendment due process and equal protection. Douglas v. California, 372 U.S. 353 (1963). The action of the Georgia habeas corpus court denying

Petitioner's motions deprived Petitioner of meaningful access to the state habeas corpus proceeding. Bounds v. Smith, 430 U.S. 817 (1977).

"The right to offer the testimony of witnesses and to compel their attendance if necessary...is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also, Webb v. Texas, 409 U.S. 95 (1972). The Georgia Code Ann. §38-801(d) requires witness and mileage fees to be tendered with a subpoena if the subpeona is to be enforceable. Thus, an indigent is deprived of the right to compulsory process.

In Lawrence v. Henderson, 344 F. Supp. 1287 (E.D. La. 1972), prison officials had refused to allow inmates served with subpoenas by a defendant to comply with the subpoenas. In holding these facts to constitute a violation of the right to compulsory process, the District Court stated:

> " The record is barren as to the reason for the denial of compulsory process. Petitioner may have had it denied him through inadvertance or other innocent reason. The cause of the denial, however, is immaterial. It is the resulting inability to compel [the witness] to testify which is unconstitutional."
> 344 F. Supp. at 1295.

The ability to compel the attendance of witnesses is essential if Petitioner is to present the merits of his habeas corpus petition in the habeas proceeding. The record of his trial and direct appeal are of little value in the post-conviction proceeding, without supplementation by testimony from witnesses.

A petitioner must be able to present witnesses to substantiate newly discovered and often complex claims with respect to the unconstitutionality of his conviction and sentence. Without the funds to subpoena witnesses, the post-conviction procedure is but a legal fiction for the indigent petitioner.

In a long series of cases, this Court has invalidated processes which denied the poor access to the courts or made that access ineffectual. In Griffin v. Illinois, 351 U.S. 12 (1956), this Court mandated that an indigent be provided the necessary transcripts to pursue an appeal; in Burns v. Ohio, 360 U.S. 252 (1959), the Court struck down a scheme which required an individual to pay filing fees as a prerequisite to prosecuting the appeal. In Smith v. Bennett, 365 U.S. 708 (1961), the Court struck down a scheme which denied indigents access to the courts for the purposes of seeking collateral review unless a filing fee could be paid. In each of these cases, the impediment to access to the judicial system was clearly cost.

In the present case, the Georgia law restricting Petitioner's ability to compel the attendance of witnesses created a de facto barrier to Petitioner's assertion of his constitutional claims and rendered meaningless the formal access to post-conviction relief afforded him.

The Georgia habeas corpus procedure is a procedure that Petitioner must utilize and complete before he can petition in a United States District Court for a writ of habeas corpus.

The procedure in a United States District Court is set forth in a law enacted by Congress, 28 U.S.C. §2254, which provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented.

The state habeas corpus proceeding may finally determine Fourth Amendment constitutional claims, Stone v. Powell, 428 U.S. 465 (1976), and may very well be determinative of and foreclose consideration of other substantial issues in the federal proceeding because "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction... shall be presumed to be correct..." in the federal proceeding. 28 U.S.C. §2254(d).

The function of the Georgia habeas corpus procedure as a means of determining constitutional claims in criminal cases is made clear by the Legislature's statement of legislative intent included with 1967 Ga. Laws, p. 835, et seq., a complete revision of the habeas corpus statute:

> Section 1. Statement of Legislative Intent and Purpose.
>
> The General Assembly finds that expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court, together with other decisions of said court (a) substantially curtailing the doctrine of waiver of constitutional rights by an accused and (b) limiting the requirement of exhaustion of state remedies to those currently available, have resulted in an increasingly larger number of state court convictions being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by courts of this State; that such increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights, with a resultant deterioration of the federal system and federal-state relations; that to alleviate said problems, it is necessary that the scope of state habeas corpus be expanded and modified. The General Assembly further finds that expansion of state habeas corpus to include many sharply-contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases.

The deprivation of Petitioner's right to due process and equal protection of law must be given the special scrutiny peculiar to cases where death is the penalty. "Death in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Georgia habeas corpus review must not be administered so as to deprive Petitioner, an indigent under death sentence, of an opportunity to litigate his constitutional claims. Georgia Code Ann. §38-801(d) deprives Petitioner of meaningful access to the courts in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Tattnall County.

Respectfully submitted,

Millard C. Farmer
Joseph M. Nursey
Andrea I. Young

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Application No. 1388

SUPREME COURT OF GEORGIA

ATLANTA, November 13, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HENRY WILLIS, III V. CHARLES R. BALKCOM, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX A

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

HENRY WILLIS, III, Petitioner	§	HABEAS CORPUS
VS	§	
CHARLES R. BALKCOM, Warden, Georgia State Prison	§	CIVIL ACTION NO. 80-6
Respondent	§	

JUDGMENT

After reviewing the pleadings and evidence offered at trial of this case, it is the judgment of this court that the petition for habeas corpus be, and the same is, denied upon each and every ground thereof. The petitioner is remanded to the custody of the Department of Offender Rehabilitation who shall return him to the Superior Court of Bleckley County forthwith so that a new date can be fixed for his execution. The stay of execution heretofore ordered is hereby terminated.

The findings of fact and conclusions of law upon which this judgment is based shall be recorded as part of the record in the case.

This 27 day of August, 1980.

James E. Findley
Judge Superior Courts
Atlantic Judicial Circuit

Filed in Office
this 27 day of Aug 1980
Time 3:40 P.M.
Mabel B. Williams
Deputy Clerk

APPENDIX B

P. 1

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

HENRY WILLIS, III,	§	
	§	
Petitioner	§	HABEAS CORPUS
	§	
VS	§	
	§	
CHARLES R. BALKCOM, Warden, Georgia State Prison	§	CIVIL ACTION NO. 80-6
	§	
	§	
Respondent	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner was convicted of murder and sentenced to death in the Superior Court of Bleckley County on January 28, 1978. On the trial petitioner was represented by attorney Millard Farmer. The judgment of the trial court was appealed to the Supreme Court of Georgia which, by decision rendered February 6, 1979, unanimously affirmed the judgment below. Willis v. State, 243 Ga. 185 (1979); rehearing was denied on February 27, 1979. On the appeal, petitioner was again represented by attorney Farmer. On October 1, 1979, the United States Supreme Court denied petition for writ of certiorari to review petitioner's conviction and sentence. Willis v. Georgia, ___ U.S. ___, 100 S. Ct. 178 (1979).

In the instant proceeding, petition for a writ of habeas corpus and for a stay of execution was presented to this court on January 11, 1980, on which date an Order Staying Execution was issued by the court. On January 16, 1980, Order issued sanctioning the petition for filing and setting a date and time for hearing on the same. The scheduled hearing was twice continued. Between the time of filing and the hearing, petitioner has filed several amendments and numerous motions. All motions have been ruled upon of record. Counsel for petitioner announced not ready when the case was sounded and requested another continuance. This was denied. A motion to disqualify the court was filed

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moments before the hearing was to commence. The court determined that it was not timely filed. State v. Flemming, ____ Ga. ____, (35601) (1980).

In his original petition and subsequent amendments, petitioner alleges numerous (40) constitutional infirmities in the proceedings leading to his conviction and sentence. A reading of the Supreme Court of Georgia's opinion on petitioner's direct appeal, Willis v. State, supra, reveals, however, that many of petitioner's allegations ("counts" in the petition and amendments) were raised and decided on that appeal. To wit: allegations that petitioner's trial was fundamentally unfair (count 2); that the trial prosecutors behaved unprofessionally and in violation of petitioner's rights (count 3, 21); that the jury underrepresented blacks, women, and young adults (counts 7, 13); violations of the rule of Witherspoon v. Illinois, , 391 U.S. 510 (1968) (counts 10, 34); that the traverse jury pool was unconstitutionally composed (count 13); that trial judge's refusal to sequester the jury (count 20); the appointment and alleged bias of the trial judge (counts 22, 23); the trial court's refusal to admit an out-of-state attorney to represent petitioner (count 24); the trial court's limitation of argument (count 25); the Georgia Supreme Court's refusal to extend the time for filing of petitioner's appellate brief (count 26); the alleged prejudicial effect of the testimony of the victim's widow (count 27); and the exclusion of mothers with young children (count 38). It is well-settled law in Georgia that issues decided on direct appeal may not be relitigated in a habeas corpus proceeding. Elrod v. Ault, 231 Ga. 750 (1974). These matters having been decided adversely to the petitioner by the Supreme Court of Georgia and certiorari having been denied by the Supreme Court of the United States, neither issue can be reconsidered in this habeas proceeding.

Petitioner's remaining counts allege the following: ineffective assistance of counsel (counts 1, 40); improper review of petitioner's case by the Supreme Court of Georgia (count 4);

errors in the sentencing phase of the trial (counts 5, 6); influence by the prosecuting attorneys counsel (count 8); unconstitutional application of the death penalty (count 9); improper exclusion of jurors (count 11); an illegally composed grand jury (count 12); the presence of the investigative officer at the prosecution table was improper (count 14); that the conviction was based upon incompetent evidence (count 15); that the prosecutor's argument was inflammatory and improper (counts 16, 36); that the presence of the victim's family violated petitioner's rights (count 17); that the trial court remained in session for excessive lengths of time (count 18); that the trial court refused to provide investigative funds for the defense (count 19); that the State's failure to pay for investigators, expert witnesses, etc. for petitioner is a violation of his rights (count 28); that the trial court improperly excluded jurors on account of their age (count 30); the District Attorney's cross-examination of petitioner was improper (counts 31, 32); jurors were not properly excluded (counts 33, 35); jurors were improperly excluded on account of race (count 34); that the trial judge was biased (count 37); and that defense witnesses were not allowed to testify fully during the penalty phase of the trial (count 39).

"A mere allegation that one has been denied constitutional rights....is not sufficient reason for setting aside a sentence in habeas corpus." Salisbury v. Grimes, 223 Ga. 776 (1967) Moreover, the burden is on the habeas corpus petitioner to establish the factual basis of his contentions. Sims v. Smith, 228 Ga. 136 (1971). Yancey v. State, 223 Ga. 401 (1974). In the present proceeding the petitioner offered no evidence to substantiate all or either of the above allegations. No witnesses who might have offered relevant testimony were subpoenaed. Petitioner's only witness was his counsel. Although lengthy, this testimony is unpersuasive on any material point. Petitioner's allegations as to ineffective assistance of counsel, specifically, have been found to be without merit both by our Supreme Court, Willis v. State, Supra, at 187, and by this habeas court (H.T., p. 125).

App. B, p. 4

By supplemental brief filed with leave of court, petitioner contends, finally, that his situation is controlled by the recent decision of the United States Supreme Court in Godfrey v. Georgia, _____ U.S. _____, 100 S. Ct. 1759 (1980), in which Godfrey's death sentence, based solely upon Georgia's statutory aggravating circumstance (b)(7) [Georgia Code Ann. §27-2534.1(b)(7)] was set aside. The decision in Godfrey is not germane to or controlling of Petitioner's case. Petitioner's death sentence was based not only upon (b)(7), "The offense. . .was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim.", but also upon Georgia Code Ann. §§27-2534.1(b)(8), "the offense of murder was committed against any peace officer. . .while engaged in the performance of his official duties." and (b)(10), "The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." Petitioner's argument is without merit.

Grounds of complaint in the application for relief on habeas corpus have been considered and, in each instance, are determined to be without merit. There has been no denial of any of Petitioner's constitutional rights. The court finds no merit in Petitioner's application and relief is expressly denied upon each and every ground thereof. Petitioner is remanded to the custody of the Department of Offender Rehabilitation who shall return him to the Superior Court of Bleckley County forthwith so that a new date can be fixed for his execution. The stay of execution heretofore ordered is hereby terminated.

This findings of facts and legal conclusions is a part of the judgment in this case and shall be filed with the judgment as part of the record.

This 29 day of August, 1980.

James E. Findley
Judge Superior Courts
Atlantic Judicial Circuit

APP. B, P. 5

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Convictions

When Applications Granted An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 38-801(d)

(d) Fees; mileage.--The witness fee shall be $10 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance, but when a witness resides outside the county where the testimony is to be given, service of the subpoena to be valid must be accompanied by tender of the fee for one day's attendance plus mileage of 20 cents per mile for traveling expenses for going from and returning to his place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency or postal money order, or by cashier's or certified check. When the subpoena is issued on behalf of the state, or an officer, agency or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whoses liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

APPENDIX C

P. 1

(1) Grounds for writ.--

Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or priviledge which relenquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--

The petition shall identify the proceeding in which the petitionor was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--

Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other quthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--

Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--

Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

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(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within

App. C, p. 3.

a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

Georgia Code Annotated Section 27-2534.1(b)(7)

(b)(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

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IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

HENRY WILLIS, III,
Petitioner

vs.

CHARLES BALKCOM,
Respondent

HABEAS CORPUS

CIVIL ACTION NO. 80-6

MOTION CHALLENGING CONSTITUTIONALITY

OF GEORGIA CODE §38-801(d)

Now comes the Petitioner, Henry Willis, III, in the above stated case and moves that this Court find those provisions of Georgia Code §38-801(d) requiring the tender of attendance and mileage fees with a witness subpoena, unconstitutional both on its face and as applied to Petitioner.

The grounds for this motion are:

1.

The Petitioner, Henry Willis, III, is an indigent person imprisoned on death row. He is wholly without funds to pay the required attendance and mileage fees.

2.

Petitioner needs to subpoena numerous witnesses in this cause who will present relevant, probative, and necessary evidence.

3.

Requiring Petitioner to pay these attendance and mileage fees, which he is unable to pay, deprives Petitioner of his rights to compulsory process to compel the attendance of witnesses, effective assistance of counsel, a fair hearing in this cause, due process and equal protection of the law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Georgia.

APPENDIX D P. 1

WHEREFORE, Petitioner moves this Court to grant a hearing before and fair, impartial, and independent judge where Petitioner may present evidence on each of the allegations made and that this Court declare Georgia Code §38-801(d) unconstitutional both on its face and as applied to Petitioner.

Respectfully submitted,

Millard C. Farmer
Joseph M. Nursey
Andrea I. Young
ATTORNEYS FOR PETITIONER

Suite 831
15 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404)688-8116

App. D, p. 2

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party a copy of the foregoing by placing in the United States Mail a copy of the same addressed to Mr. Arthur K. Bolton, Attorney General for the State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, with adequate postage thereon.

This 13th day of February, 1980.

Joseph M. Nursey

Suite 831
15 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404)688-8116

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IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

HENRY WILLIS, III,
Petitioner

vs.

CHARLES BALKCOM,
Respondent

HABEAS CORPUS

CIVIL ACTION NO. 80-6

MOTION FOR FUNDS TO OBTAIN

INVESTIGATORS AND EXPERT WITNESSES

Now comes the Petitioner and moves this Court to order that the State provide Petitioner with reasonable funds to employ experts and investigators, as set out below, to enable him to prepare an adequate hearing and to guarantee his rights to due process of law and to a fair trial provided under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Georgia.

In support of this motion, Petitioner states the following:

1.

Petitioner was convicted of murder and was sentenced to death. He is currently imprisoned in Georgia State Prison, Reidsville, Georgia.

2.

Petitioner is indigent and is completely without funds necessary to hire expert witnesses and investigators necessary to prepare his case. Petitioner is currently represented by volunteer counsel.

3.

The following are among the experts and investigators needed to guarantee Petitioner a full and fair hearing under the Constitution of the State of Georgia and the United States Constitution:

APPENDIX E p.1

a) A social psychologist who can expertly testify as to the effects of the racial prejudice evidenced in the community and the courtroom. The testimony of these experts would demonstrate the racist attitude and actions of the prosecutor towards blacks manifest in the transcript, in his conduct during voir dire, juror selection, the guilt or innocence and sentencing phase of the trial as well as his actions outside the courtroom. A social psychologist could also analyze the prejudicial attitutdes against blacks evidenced by the trial judge's conduct. This analysis would present crucial data on the effect of the prosecutor's and judge's prejudicial conduct upon the jury.

A social psychologist would also be available to testify as to the effects of the heightened racial tension in Bleckley County, because of the recent trial of a black man accused of raping a white woman, upon the ability of individual jurors to cafefully weigh the issues. This expert analysis would demonstrate the allegation that Petitioner's conviction by a jury in an atmosphere of passion, prejudice and any other arbitrary factors violates Petitioner's rights to a fair trial, constitutes cruel and unusual punishment, and deprived him of life and liberty without due process of law and equal protection of the law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Georgia.

b) An expert witness who can conduct and interpret public opinion surveys to demonstrate the hostile attitudes by members of the community of Bleckley County, generated by the State, against Petitioner's counsel deprived him of his consistutional right to

effective assistance of counsel, a fair trial, due process and equal protection of the law as provided in the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the Constitution of the State of Georgia.

c) A content analysis expert who could analyze and testify to the content and the prejudicial impact upon the community of pretrial publicity and show that the adverse publicity overwhelmingly prejudiced the community and jurors, depriving Henry Willis, III, of a fair trial in Bleckley County.

d) An expert witness to investigate and testify with regard to the procedures by which the Georgia Supreme Court reviews the conviction and sentencing in capital cases to show that such procedures do not meet the statutory requirements for comparative case review provided in Ga. Code Ann. §§ 2-101, 2-107, 2-109, 2-122, 27-2537(c)(1) and by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

e) A social psychologist or psychiatrist to testify to the adverse psychological and physical effects upon both Petitioner and Petitioner's counsel of holding court for ten hours a day, six days a week which prevented Petitioner from having time to adequately prepare for trial and denied him a fair hearing, effective assistance of counsel, equal protection and due process of law guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by the Constitution of the State of Georgia.

f) An investigator to investigate and testify as to the past actions of the prosecutor to demonstrate a pattern and practice of eliminating blacks from juries in a discriminatory manner by the use of preemptory challenges.

g) An investigator to investigate the composition of the traverse jury pool in Bleckley County to substantiate Petitioner's claim that his death sentence was imposed by a jury drawn from an unconstitutionally composed jury pool. An expert will also be needed who can testify as to the composition of the grand and traverse jury pool.

Without funds to obtain these expert witnesses and investigators, Petitioner is deprived of his rights of effective assistance of counself, a fair hearing, due process and equal protection of the law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the Constitution of the State of Georgia.

WHEREFORE, Petitioner moves this Court to grant an evidentiary hearing on this motion before a fair, impartial, and independent judge where Petitioner may present evidence on each of the allegations made and grant the relief requested therein.

Respectfully submitted,

Millard C. Farmer
Joseph M. Nursey
Andrea I. Young
ATTORNEYS FOR PETITIONER

Suite 831
15 Peachtree Street, N.E.
Atlanta, Georgia 30303
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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party a copy of the foregoing by placing in the United States Mail a copy of the same addressed to Mr. Arthur K. Bolton, Attorney General for the State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, with adequate postage thereon.

This 13th day of February, 1980.

Joseph M. Nursey

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(404)688-8116

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CHARGE OF THE COURT

Now, as I have earlier pointed out to you in my preliminary instructions in regard to this pre-sentence hearing on punishment, you have found the Defendant guilty of the offense of murder. And it is now your responsibility to determine within the limits prescribed by law the penalty that shall be imposed for this offense. In arriving at your findings as to punishment, you are authorized to consider all of the evidence received by you in open Court in both

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APPENDIX F
P. 1

phases of the trial. That is, the trial on the issue of guilt or innocence and in this pre-sentence hearing on the question of punishment. You are authorized to consider all of the facts and circumstances of the case.

Under the law of this State, every person found guilty of murder shall be punished by death or by imprisonment for life. In all cases for which the death penalty may be authorized, the law provides that the judge shall instruct the Jury concerning mitigating circumstances or aggravating circumstances which the Jury may consider in making the decisions which will determine the punishment to be imposed for each offense.

In arriving at your determination as to sentence, you are authorized to consider all the testimony in evidence presented to you by the State and by the Defense. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation. Mitigating circumstances are those which do not constitute a justification or excuse for the offense of murder, but which in fairness and mercy may be considered as extenuating or reducing the degree or moral culpability of punishment. Aggravating circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences. A finding of aggravating circumstances in no way justifies the automatic imposition of the penalty of death by electrocution.

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WANELLE D. SAYER
Official C. R.
Sayer, South, Sayer

Regardless of the presence or absence of aggravating circumstances, the Jury has both the right and the authority to impose a sentence of imprisonment for life.

The law provides that where, upon a trial by Jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the Jury verdict as to sentence includes a finding of at least one statutory aggravating circumstance and a recommendatio that a death sentence should be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the Court shall sentence the Defendant to death.

Where a sentence of death is not recommended by the Jury, the Court shall sentence the Defendant to life imprisonment as provided by law.

Unless the Jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the Court shall not sentence the Defendant to death.

Now, the State contends that certain aggravating circumstances exist in this case. The statutory aggravating circumstances which the State contends exist in this case are as follows: (1) That the offense of murder was outrageous or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the

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WANELLE D. SAYER

victim. Now an aggravated battery is defined in our law as follows: A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body or by rendering a member of his body useless or by seriously disfiguring his body or a member thereof. The second statutory aggravating circumstance which the State contends to exist in this case is that the offense of murder was committed against a peace officer while engaged in the performance of his official duties. The third statutory aggravating circumstance which the State contends to exist in this case is that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of himself or another. Now, I have those three statutory aggravating circumstances recited on a sheet of paper which I will send out with you. If you make a finding, it must be stated in the appropriate language.

Now, in arriving at your verdict in this case, you will consider evidence as to mitigating circumstances which the Defendant contends exist in this case, and you will also consider evidence as to the statutory aggravating circumstances which the State contends exists in this case.

If you find beyond a reasonable doubt that the State has proved the existence in this case of either one or more of the aggravating circumstances as contended by the State and as given you in Charge by the Court, then you would be

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authorized to recommend the imposition of a sentence of death, but you would not be required to do so. If you recommend the imposition of a sentence of death, the Court would be required to sentence the Defendant to death by electrocution. If you find beyond a reasonable doubt that the State has proved the existence in this case of one or more of the aggravating circumstances as contended by the State and as given you in Charge by the Court, you would also be authorized to recommend the Defendant to the mercy of the Court, which is a recommendation you may make either with or without a reason. You may make it for any reason that is satisfactory to you or without a reason. You may make it arbitrarily as a matter of course or as a matter of discretion. If you recommend the Defendant to the mercy of the Court, the Court would be required to sentence the Defendant to confinement in the State penetentiary for and during his natural life.

If you do not find beyond a reasonable doubt that the State has proved the existence of any of the statutory aggravating circumstances about which the Court has charged you, you would not be authorized to consider the penalty of death, but would fix the punishment at life in prison, and the Court would then be required to sentence the Defendant to confinement in the State penetentiary for and during the term of his natural life.

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WAMILLE D SAYER
Official C R
Sayer Smith Sayer

Your verdict must be in writing. It must be dated. It must be signed by your foreman and entered on a separate sheet which I have now attached to the Indictment.

Now, in addition, as I pointed out, I have prepared a listing of the contended aggravating circumstances which may be considered by you in determining what sentence to impose. So you will have out with you the original Indictment to which a sentencing sheet has been attached in order that you can write your sentence verdict on that and you will have another piece of paper setting out the language of the contended aggravating circumstances.

If your finding is that the Defendant should be punished by life imprisonment then you would write on the sentencing sheet, and I have started out the wording for you, "Having found the Defendant, Henry Willis, III, guilty of murder, we the Jury now fix punishment as blank." You would there write, if you find that he should be sentenced to life imprisonment,"Now fix punishment as life imprisonment." It would be dated and signed by your foreman.

If you unanimously find beyond a reasonable doubt that one or more of the statutory aggravating circumstances as contended by the State and as given you in the Charge by the Court exist in this case, and you have determined to recommend the punishment of the Defendant by death, then the form of your verdict would be, "We the Jury now fix

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punishment as death by electrocution." The Jury would then have to add, "We further find the following statutory aggravating circumstance or circumstances to exist in this case." And you would then write out in that verdict the statutory aggravating circumstance or circumstances which you find to exist, using the exact language given you in the Charge of the Court and also repeated on the form of the aggravating circumstances submitted to you for your consideration. And following that language, you would add, "And we recommend that the Defendant be punished by death." That verdict would mean that the Court would be required to sentence the Defendant to death by electrocution.

I charge you further that if you believe beyond a reasonable doubt that the State has proved the existence of one or more of the statutory aggravating circumstances about which the Court has charged you, you may recommend the Defendant to the mercy of the Court. And in that event, the form of your verdict would be as follows: "We the jury find the following statutory aggravating circumstance or circumstances to exist in this case." And you will then, as indicated earlier, write out in your verdict the statutory aggravating circumstance or circumstances which you find to exist, using the exact language which the Court has given you in Charge and as set out on the forms showing the statutory aggravating circumstances submitted for your

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consideration. And following that language, you would add, "We recommend the Defendant to the mercy of the Court." That verdict would require the Court to sentence the Defendant to confinement in the penetentiary for and during his natural life.

You cannot consider the death sentence unless you find that at least one of the aggravating circumstances exists beyond a reasonable doubt. Your finding as to the presence or absence of any aggravating circumstance must be unanimous. If you do not find at least one aggravating circumstance, you must sentence the Defendant to life imprisonment. However, even if you do find a statutory aggravating circumstance or more than one, you are not required to impose a death sentence. You are authorized to impose a death sentence, but you are not required to do so. You may recommend that a life sentence be given even if you find that one or all of the statutory aggravating circumstances exist.

Let me again emphasize to you that in our system of jurisprudence, everyone stands equal before the law, irrespective of race, color, creed, or sex. It is important that justice be even-handed and dispensed impartially and without bias or prejudice, either for or against one accused of crime. Whatever might be his or her race, color, creed, or sex. Eliminate any consideration of race or color from your determinations in this matter. Make your

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judgment upon the basis that persons involved are simply human beings without identification insofar as you are concerned as to race or color.

Now, as required by law, the instructions as to aggravating circumstances about which I have given you oral instructions have been put in writing by the Court and will be sent out to you for your use in your deliberations. You will have out in the Jury Room with you any exhibits admitted in the trial of this case in either phase.

Let me remind you again that your sentence as to punishment must be unanimous. The State has the burden of proving beyond a reasonable doubt that one or more aggravating circumstances as I have outlined to you existed before you would be justified in fixing the death penalty in this case.

Let me review with you again that you have three choices as to verdict. Again, on a sheet that I have now attached or stapled to the Indictment, I have put on there the style of the case and it's captioned "Jury Verdict as to Punishment," and I have put in the beginning words, "Having found the Defendant, Henry Willis, III, guilty of murder, we the Jury now fix punishment as blank." And it's up to you to fix the punishment, and you have three options. You should either complete that sentence as "We the Jury now fix punishment as life imprisonment." It would be dated and signed by your foreman. Or, "We the Jury now fix punishment

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as death by electrocution, and we the Jury further find the following statutory aggravating circumstance or circumstances to exist," and you would have to itemize in the language stated on here any statutory aggravating circumstance which you might find to exist. It may be one; it may be more than one. That is a matter solely for you to determine--whether there is any or whether there is one or two or three. After writing that, then you would put in, "And we recommend sentence of the Defendant to death." That would be dated and signed by the foreman. Now, the third choice would be--and in the third choice you would have to make some modification here. It would be, "We the Jury find the following statutory aggravating circumstances to exist." And there your would write in any statutory aggravating circumstances which you may find to exist if you so find one or more. And then at the end of that, you would state, "And we recommend the Defendant to the mercy of the Court." And that would be dated and signed by the foreman. The effect of that sentence would be that the Jury would have found aggravating circumstances but recommending mercy to the Court. It would require the Court to impose a sentence of life imprisonment. So the point is, you cannot impose a death sentence unless you find statutory aggravating circumstances to exist and any verdict in regard to the death sentence must include such findings. You may find

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a statutory aggravating circumstances and yet recommend the Defendant to the mercy of the Court, in which event you would have found the statutory aggravating circumstances but the Court would impose a life imprisonment sentence. Or you the Jury may simply fix the punishment as life imprisonment without saying anything any further. Those are the three choices that you as a Jury have in considering sentence in the matter. And it is your determination to make. You should not construe the fact that I am sending any forms to you as indicating to you or inferring to you that you should or must find such. You should not make any inference from anything I have said or any order in which I have given you the instructions as to what your sentence as to punishment--verdict as to punishment--should be.

Now, at this time, I will ask that the 12 basic Jurors be retired to the Jury Room. Do not begin your deliberations until I send in to you the Indictment and verdict form and statutory aggravating circumstances and exhibits admitted into the case. Once those items are sent in to you, you can begin your deliberations at that time, but don't begin your deliberations until those items arrive in the Jury Room.

Let the two alternate Jurors wait here while this Jury is retired to the Jury Room.

(STENOGRAPHER'S NOTE: At this time the Jury retired to the Jury room to

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Waycross, Georgia 31501

fix punishment, the time being 9:35 A.M.)

THE COURT: Now, gentlemen, you are instructed that you must be sequestered under the care of a Bailiff as are the Jurors now passing on the case. Do not discuss the case with anyone, including the Bailiff assigned to your care. Should any Juror now considering the case become ill or otherwise unable to continue, you would then be responsible for joining the deliberations instead of the Juror who might have that contingency arise. In the meantime, you must be sequestered pending the return of a verdict by the Jury or unless otherwise directed by the Court. You may retire to a separate room for your use. Mr. Sheriff, I ask that they be kept in the Probation Office there, please, sir, and make no communication with them yourself nor permit anyone else to communicate with them. If you will accompany the Sheriff, he will show you to the room where you will be kept.

(JURORS RETIRE)

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(STENOGRAPHER'S NOTE: At that time, the Jury was returned to the jury box, and the proceedings resumed as follows:)

THE COURT: Ladies and Gentlemen, as a Jury you have

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Waycross, Georgia 31501

sent the Court the following question: "Will the Defendant have to serve his full term which he is now serving before he will begin to serve his sentence on this case"? Responding to that, I instruct you that the code of the laws of this State provides as follows: "That where a person is convicted on more than one Indictment in different Courts and sentenced to imprisonment, such sentences shall be served concurrently--the one with the other--unless otherwise expressly provided therein." Thus, the answer to your question as asked would be "no." That any sentences would be served concurrently unless the sentence expressly provides otherwise. You, therefore, as a Jury may make as part of your verdict a recommendation as to whether sentence should be served consecutively; that is, to follow another sentence; or whether it should be specified to be served concurrently. Now the second question you asked is "When will he be eligible for parole if given a life sentence"? And I instruct you that is not a matter for the Jury's consideration. Mr. Sheriff, return the Jury to the Jury Room, sir.

(STENOGRAPHER'S NOTE: Thereupon, the Jury retired to the Jury room, the time being 10:35 A.M.)

THE COURT: Alternate Jurors have been returned to their room? All right. Objections, exceptions, to the Court's response and Charge to the Jury responding to their

App. F, p. 14

WANELLE D. SAYER
Official C. C. R.
Sayer - Smith - Sayer
Route 2
Wray, Georgia 31798

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

HENRY WILLIS, III	§	
	§	
Petitioner	§	HABEAS CORPUS
	§	
VS	§	
	§	
CHARLES R. BALKCOM, Warden Georgia State Prison	§	CIVIL ACTION NO. 80-6
	§	
Respondent	§	

O R D E R

Petitioner moves to challenge the constitutionality of Georgia Code Annotated, §38-801(d) requiring the tender of attendance and mileage fees with witness subpoenas, alleging that the aforesaid provision is unconstitutional both on its face and as applied to petitioner.

Petitioner's allegations and his Motion Challenging Constitutionality of Georgia Code Annotated, §38-801(d) are without merit. On the appeal of another habeas corpus case which had been tried before this court, the petitioner/appellant complained that certain witnesses not having appeared at the hearing, the trial court took no action to compel their attendance. "The witnesses who did not appear and whose presence the prisoner insisted upon were admittedly not tendered the mileage and per diem required for out-of-county residents before their attendance may be compelled....Ga. L. 1966, p. 502 (Code Ann., §38-801(d)) and the provisions of Art. I, Sec. I, Par. V of the Constitution of 1945 (Code Ann., §2-105) [Art. I, Sec. I, Par. XI of the Constitution of 1976 (Code Ann., §2-111)] do not contemplate that the public shall bear the expense of bringing witnesses into court." (Emphasis added) Neal v. Smith, 226 Ga. 96, 98 (1970.)

APPENDIX G, p. 1

Moreover, numerous alternative means of securing testimony are available under Code Ann., §50-127(7), including oral depositions, depositions on written interrogatories, and sworn affidavits. In fact, as was recently emphasized by the Supreme Court in Crawford v. Linaham, 243 Ga. 161 (1979), subsection (a) of §50-127(7) specifically provides as follows: "The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves." Petitioner, the moving party, has offered no demonstration that such alternative methods have been attempted.

Petitioner has failed to establish that the intention of the General Assembly and of the Constitution of Georgia, as expressed in Ga. Code, §38-801(d) and Ga. Code, §2-111 respectively, is in any way unconstitutional.

IT IS ORDERED, THEREFORE, that petitioner's motion be and hereby is DENIED.

SO ORDERED this 18 day of March, 1980.

James E. Findley
James E. Findley
Judge Superior Courts
Atlantic Judicial Circuit

App. G, p. 2

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

HENRY WILLIS, III	)	
	)	
Petitioner	)	HABEAS CORPUS
	)	
VS	)	
	)	
CHARLES R. ERLICH, Warden Georgia State Prison	)	CIVIL ACTION NO. 80-6
	)	
Respondent	)	

ORDER

Petitioner's Motion for Funds to Obtain Investigators and Expert Witnesses having been considered,

ORDERED, that the same be, and hereby is, denied on each and every ground thereof.

SO ORDERED this 18th day of March, 1980.

/s/ James L. Findley
James L. Findley
Judge Superior Courts
Atlantic Judicial Circuit

Appendix H

RECEIVED
JAN 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HENRY WILLIS, III *

Petitioner, * NO. 80-6030

vs. *

CHARLES BALKCOM, Warden, *
Georgia State Prison,
*

Respondent *

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Henry Willis, III, who is now held in the Georgia Diagnostic and Classification Center at Jackson, Butts County, Georgia, asks leave to file the attached Petition for a Writ of Certiorari to the Superior Court of Tattnall County without prepayment of costs and to proceed in forma pauperis.

Affidavit of Petitioner in support of this motion is attached hereto.

Millard Farmer

Millard C. Farmer
Joseph M. Nursey
Andrea I. Young

ATTORNEYS FOR PETITIONER

15 Peachtree Street, N.E.
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80-6030

RECEIVED
JAN 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HENRY WILLIS, III,

Petitioner,

vs.

CHARLES R. BALKCOM, Warden,

Respondent

AFFIDAVIT IN SUPPORT
OF REQUEST TO
PROCEED IN FORMA PAUPERIS

I, Henry Willis, III, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes___ No X

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

   _____

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.
   Incarcerated since 1976; before this, earned minimum wage.

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes___ No X

   b. Rent payments, interest or dividends? Yes___ No X

   c. Pensions, annuities or life insurance payments? Yes___ No X

   d. Gifts or inheritances: Yes X No___

   e. Any other sources: Yes___ No X

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

   Over the past 12 months, I have received approx $50 total from family members for prison account

3. Do you own any cash, or do you have money in a checking or savings account? Yes X No___ (Include any funds in prison accounts). If the answer is yes, state the total value of the items owned.
less than $10 in prison account

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? yes___ no X

a. If the answer is yes, describe the property and state its approximate value.___

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

STATE OF GEORGIA
COUNTY OF BUTTS

Henry Willis III
Henry Willis, III

Sworn to and subscribed before me this 9th day of January, 1981.

Dimellon Tumble
NOTARY PUBLIC
My commission expires:

August 20, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6030

Office-Supreme Court, U.S.
FILED
JAN 29 1981
ALEXANDER L. STEVAS,
CLERK

HENRY WILLIS, III,

Petitioner,

v.

CHARLES BALKCOM, Warden,

Respondent.

ORIGINAL COPY

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF TATTNALL COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

HARRISON KOHLER
Assistant Attorney General
Counsel of Record for the
Respondent.

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
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QUESTIONS PRESENTED

Was the imposition of Petitioner's death penalty constitutional?

Did Petitioner waive his right to challenge the constitutionality of Ga. Code Ann. § 38-801(d)?

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STATEMENT OF THE CASE

Nearly all of the material facts of this case are undisputed. On the evening of February 11, 1976, Son Fleming borrowed the car belonging to Terry Coney, which was a Ford Fairlane with Georgia tag number GBO-282. (T.T. 104-06). [1/] Fleming picked up his nephew, Larry Fleming, and Petitioner Henry Willis, and they made plans to commit an armed robbery. (T.T. 331, 593). That evening they drove to the store of Farrell Kent in Adel, Georgia; and while Son Fleming waited in the car, Petitioner and Larry Fleming went inside. (T.T. 114, 331, 585, 594).

Petitioner was armed with his .22 pistol, and he told Kent, "I'll kill your ass if you don't do what I tell you." (T.T. 114-15, 595). Larry Fleming looked behind the counter while Petitioner took the drawer out of the cash register. (T.T. 116). Kent put the money, including one-half of a dollar bill, in a sack, and Petitioner said, "You're going with me." (T.T. 116-17). However, when Larry Fleming mentioned there was someone outside, Petitioner then told Kent, "I'll be back." (T. 117). After Petitioner and Larry Fleming took the money and left, Kent phoned the police. (T.T. 117-18, 331). The robbery was reported to Adel Police Dispatcher Andrew Moody. (T.T. 167-68).

February 11, 1976 was intended to be the last day of work for Ray City Police Chief James Giddens, as he had already tendered his resignation. (T.T. 90, 92). When Petitioner and the Flemings fled Adel, they drove through Ray City, where they were stopped by Giddens. (T.T. 126-27, 174, 331, 585, 595). Before Giddens got out of his car, he made a radio transmission to the Nashville Police Department that he had stopped a red and white Ford, tag number GBO-282, with two black men in it. (T.T. 186-87).

1/ The record in this case consists of 38 volumes, which contain 12,401 pages. T.T. refers to the trial transcript, which consists of four volumes totaling 1,151 pages.

Giddens searched Coney's car and when he found the robbery money, Petitioner and the Flemings grabbed Giddens and disarmed him. (T.T. 332, 586, 596). They put Giddens into Coney's car and began driving. (T.T. 332, 596). Near a swamp in Lanier County, Son Fleming stopped and ordered Giddens out of the car. (T. 332, 586, 597). Giddens tried to run into the swamp, and Son Fleming began shooting at him with the policeman's .357 magnum.

Giddens was hit in the arm and abdomen, but these wounds were not fatal. (T.T. 332, 359, 361, 381-82, 386, 586). As Giddens lay wounded in the swamp water, Petitioner and Larry Fleming waded out to him. (T.T. 332, 586, 598). Petitioner took the .22 pistol and shot Giddens in the head five times at point blank range. (T.T. 274, 332, 350, 375, 586, 598). 2/

Giddens was shot in the right temple, right cheek, the middle of his forehead, left temple, and left eye. (T.T. 375-76). When he had been shot in the left temple, the pistol had been placed against his head; and this wound was the cause of death. (T.T. 365, 377, 383, 386).

Because Giddens made no other radio transmissions and did not return to his original location in Ray City, the Nashville Police Department asked Berrien County Deputy Sheriff James Rowan to check on Giddens. (T.T. 127). Giddens' abandoned police car was found, and a statewide alert was placed for Coney's car. (T.T. 128-29, 174-75, 187, 192-93).

Mike Dailey heard a description of the car, and about ten minutes later, he saw it. (T.T. 197-98). Dailey had a CB radio in his vehicle; and as he followed the car, he radioed for someone to phone the police. (T.T. 198-99).

2/ Petitioner's statements were contradictory as to whether Larry Fleming ever shot Giddens. In his original confession Petitioner said he shot Giddens three times and then handed the gun to Larry Fleming who shot Giddens until the pistol was empty. (T.T. 332). Later Petitioner repudiated that part of his confession and said Larry Fleming never shot Giddens. (T.T. 350). At trial Petitioner testified he shot Giddens three times, and then Larry Fleming shot Giddens.

Brooks County Deputies Willie Jones and Richard Weaver received a call giving the location of the car, and when they saw it, they turned on their blue light. (T.T. 210-12, 233-34). The car stopped, and the deputies yelled for the people in it to get out. (T.T. 202, 212-13, 233-34). Son Fleming, who was driving, got out first; and Petitioner got out second. (T. 214-15). As Deputy Jones walked toward the car, he saw Larry Fleming hiding in the car and ordered Fleming out of the car. (T.T. 215-16, 235-246).

Weaver advised the three men of their constitutional rights and asked them where Chief Giddens was. (T.T. 217, 235-36). Son Fleming gave Jones consent, later reduced to writing, for Jones to search the car. (T.T. 218, 222, 238). In the car Jones found Giddens' .357 magnum, Petitioner's .22 pistol, a roll of quarters, and a sack of bills which included one-half of a dollar bill, which matched the other half in Farrell Kent's possession. (T.T. 92-93, 99, 119, 223-24, 295, 611).

At first Petitioner and the two Flemings denied any knowledge of Giddens' whereabouts. (T.T. 217, 235, 654). However, they eventually led police officers to the swamp, where Giddens' body was recovered about 6:00 a.m., February 12, 1976. (T.T. 131, 134-35, 268, 314-15, 323).

After the trial court quashed Petitioner's 1976 indictment (R. 650 - 58), [3/] Petitioner was reindicted by a Lanier County grand jury on August 15, 1977 for the murder of Giddens. (R. 661-62). The trial court granted Petitioner's motion for a change of venue (R. 843-52), and venue was changed to Bleckley County. (R. 879).

3/ R. refers to the three volumes of pleadings, which total 1,021 pages.

The jury found Petitioner guilty of murder and found three aggravating circumstances:

1. The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

2. The offense of murder was committed against a peace officer while engaged in the performance of his official duties;

3. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of himself or another.

The death penalty was imposed, and Petitioner's conviction and sentence were affirmed on direct appeal. Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979), cert. denied, ___ U.S. ___ (1979).

Petitioner was denied habeas corpus relief by the Superior Court of Tattnall County, and the Georgia Supreme Court denied a certificate of probable cause to appeal.

REASONS FOR NOT GRANTING THE WRIT

A. THE IMPOSITION OF PETITIONER'S DEATH PENALTY WAS CONSTITUTIONAL.

It is undisputed that Petitioner murdered a police officer and did so to avoid a lawful arrest. Petitioner does not challenge the validity of two of the aggravating circumstances but alleges the statutory aggravating circumstance set forth in Ga. Code Ann. § 27-2534.1(b)(7) was unconstitutionally applied to Petitioner.

Ga. Code Ann. § 27-2534.1(b)(7) provides the death penalty may be imposed if the "murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Godfrey v. Georgia, ___ U.S. ___ (1980), this Court vacated a death penalty imposed for the shotgun slaying of two persons. Both victims died instantly, and the only aggravating circumstance was that set forth in Ga. Code Ann. § 27-2534.1.

In Petitioner's case, he was a party to a previously inflicted serious physical injury prior to the firing of the fatal shots. Chief of Police Giddens had been shot and wounded and was lying helpless in the water when Petitioner waded up to him and fired five shots into Gidden's head.

Moreover, even if § 27-2534.1 were applied unconstitutionally to Petitioner, the existence of two other aggravating circumstances, each established beyond a reasonable doubt, constitutionally supports the death penalty in Petitioner's case. Westbrook v. Balkcom, ___ U.S. ___ (1980)(J. Stevens concurring).

B. PETITIONER WAIVED HIS RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF GA. CODE ANN. § 38-801(d).

Ga. Code Ann. § 38-801(d) provides that for a civil subpoena to be binding on a person residing outside the county, a $10.00 witness fee and $.20 per mile traveling expenses must be tendered with the subpoena. The federal practice is that for a civil subpoena to be binding, a tendering of fees and mileage is necessary. F.R.Civ.P. 45(c).

At Petitioner's State habeas hearing on May 30, 1980, the only two witnesses he subpoenaed appeared in Court. In open court counsel for Petitioner admitted he had not subpoenaed any other witnesses "because we knew we wouldn't get to their testimony for today." (State habeas transcript 79).

Since Petitioner had no intention and made no attempt to subpoena any witnesses for May 30, 1980, other than the two that appeared, he has no standing to complain that the requirement of the tendering of witness fees and mileage unconstitutionally deprived him of a full and fair State habeas hearing.

If Petitioner did not receive a full and fair State habeas hearing, the forum to raise his claim is not on a petition for writ of certiorari but is in the District Court by a federal habeas corpus petition. See 28 U.S.C. § 2254.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for relief have been set forth by Petitioner.

Respectfully submitted,

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